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October 19, 1994

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: PR Docket No. 94-106

Dear Mr. Caton:

Transmitted herewith for filing with the Commission, on behalf of the Bell Atlantic Metro Mobile Companies, are an original and four copies of their "Reply" to the Comments filed in the above-referenced proceeding concerning the Connecticut Department of Public Utility Control's Petition to retain rate regulation.

Should there be any questions with regard to this matter, please communicate with this office.

Very truly yours,

John T. Scott, III

John T. Scott, III

Enclosures

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of the Connecticut Department of	)	PR Docket No. 94-106
Public Utility Control to Retain Regulatory	)	
Control of the Rates of Wholesale Cellular	)	
Service Providers in the State of Connecticut	)	

REPLY OF THE BELL ATLANTIC METRO MOBILE COMPANIES

The Bell Atlantic Metro Mobile Companies (Bell Atlantic), by their attorneys and pursuant to Section 20.13 of the Commission's Rules, hereby submit their reply to the comments on the "Petition to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut" (Petition) filed by the Connecticut Department of Public Utility Control (DPUC).

I. THE COMMENTS CONFIRM THAT THE PETITION DOES NOT MEET THE STANDARDS OF SECTION 332.

Of the 15 comments filed on the Petition, not one added any evidence to support the DPUC's request to preserve its wholesale-only, cellular-only rate regulation. The only commenters that presented evidence as to market conditions in Connecticut were Bell Atlantic, Springwich, and McCaw, all of which oppose the Petition.[1] These parties demonstrated that there is substantial cellular

[1]Opposition of Bell Atlantic at 11-15; Comments of Springwich Cellular Limited Partnership at 4-11, 13-19; Opposition of McCaw Cellular Communications, Inc. at 20-23.

competition at the wholesale and retail levels, that prices have been consistently falling, and that cellular subscribership has grown exponentially.[2] They also showed that the DPUC had failed to establish any nexus between its wholesale-only scheme and the protection of end-users, and that the DPUC's regulation of only one type of CMRS violated Section 332's mandate for even-handed regulation of competitors. Other parties showed that rate regulation was if anything harming consumers by increasing the costs of service and decreasing the ability of carriers to respond to competitive offerings.[3] They also noted that Connecticut's retention of authority to regulate terms and conditions of service, as well as the Commission's Section 208 complaint procedures and other sanctions, provided Connecticut consumers with ample protection.

In contrast, the few parties supporting the DPUC's Petition do not supply any evidence at all as to market conditions or that rate regulation -- particularly the wholesale tariffs the DPUC enforces -- is necessary to protect consumers. They do not assert that any consumers have complained or that rates to end-users are unreasonable. Their various arguments can be quickly rejected.

1. Connecticut's Attorney General and Office of Consumer Counsel laud the DPUC's inquiry as "comprehensive," "thorough," "extensive," and "in full

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[2]Opposition of Bell Atlantic at 11; Comments of Springwich at 4 n.5, 13-14, 22; Opposition of McCaw at 21.

[3]Opposition of the Cellular Telecommunications Industry Ass'n, and attached Affidavit of Professor Jerry A. Hausman at 6-7.

compliance with Connecticut's statutory requirements " for DPUC proceedings.[4] But neither the scope of the DPUC's inquiry, or its adherence to procedural due process, in any way show that the Petition meets the Section 332 standard on the merits. As Bell Atlantic and others explained, it does not. The Attorney General urges the Commission "to allow the state to protect its residents from being charged unreasonable rates." Comments at 7. Yet there is not a shred of evidence offered either by the Attorney General or the DPUC that consumers are paying unreasonable rates, or that the DPUC's wholesale-only tariff scheme in any way affects, let alone protects, consumers.

2. The Attorney General and Office of Consumer Counsel merely refer to the DPUC's findings. They present no independent evidence, but instead rely on conclusory assertions, such as that the cellular marketplace is "not truly competitive."[5] Such general contentions are simply irrelevant to a Section 332 petition. The Commission must be given detailed factual evidence, not assertions, and the evidence must go to the particular conditions in the state which require regulatory intervention. For example, Section 20.13(a)(2) of the Commission's Rules includes consumer complaints as one type of evidence which could be pertinent to reviewing a state petition. Both agencies note they are responsible for consumer protection, and both departments have formal procedures for

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[4]Comments of the Attorney General of the State of Connecticut at 3, 5; Comments of the Connecticut Office of Consumer Counsel at 6-7.

[5]Comments of the Attorney General at 3; Comments of the Office of Consumer Counsel at 2.

receiving and acting on consumer complaints. It is thus significant that neither agency has received any complaints at all from cellular customers.

3. Contrary to the Attorney General's assertion, Congress and the Commission have not "endorsed" state regulation.[6] In fact, Congress created a presumption against state regulation in order to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure." H.R. Rep. No. 103-111, 3rd Cong., 1st Sess. 260 (1993). States have the burden of proof. Section 20.13(a)(4). Far from endorsing state rate regulation, Congress made it clear that preemption would be the rule and state rate regulation the exception.

4. Two Connecticut resellers misstate the legal standard, asserting that the Commission should defer to the DPUC's findings. Acknowledging that there is no explicit statutory directive for any such deference, they claim that "[i]mplicitly, the Budget Act contemplates that the states are the triers of fact and their judgment regarding local market conditions should stand, absent a finding by the Commission that a state's decision is unreasonable in light of the evidence."[7]

This is wrong. A state must present evidence that market conditions "fail to protect subscribers adequately from unjust and unreasonable rates or rates that

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[6]Comments of the Attorney General at 2.

[7]Comments of Connecticut Telephone and Communications System, Inc. and Connecticut Mobilecom, Inc. at 3.

are unjustly or unreasonably discriminatory." Section 332(c)(3)(A). The Commission's Rules identify the types of evidence, information, and analysis the Commission will consider "pertinent to our examination of market conditions and consumer protection."[8] The Commission has correctly interpreted the Budget Act to require it to engage in its own review of the evidence provided by the states rather than giving deference to findings made by the states.

As Bell Atlantic and others argued in opposition to the DPUC, the Petition should be denied as a matter of law, because on its face it does not show that wholesale rate regulation is necessary to protect consumers in Connecticut.[9] If the Commission nonetheless decides to delve into the reams of testimony and briefing produced in the DPUC's proceeding, it cannot defer to the DPUC's findings, but must conduct its own review of the state's evidence to evaluate whether the DPUC has satisfied its burden of proof. It is the Commission's statutory duty to decide whether to grant or deny a state's petition, and it cannot abdicate this duty. Such deference to states' findings would frustrate the federal purpose of establishing a unitary regulatory scheme for CMRS.

Deference would be particularly inappropriate here because, as Bell Atlantic's Opposition showed, the Petition and the underlying Decision attached to

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[8]Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, 9 FCC Rcd. 1411, 1504 (1994) ("Second Report and Order") (emphasis added).

[9]Opposition of Bell Atlantic at 7-10; Comments of Springwich at 24-27; Opposition of McCaw at 17.

it do not even make findings on many of the issues the DPUC investigated but decide that further investigations are needed to resolve those issues. For example, on the critical issue of whether the cellular carriers' rates of return were reasonable or excessive, the DPUC admitted the evidence was "inconclusive." Decision at 11. The DPUC states that it intends to conduct further investigations. If those investigations lead to findings which merit rate regulation, the DPUC is free to petition the FCC at that time under Section 332(c)(3)(A). But its intent to conduct future inquiries does not constitute a basis under Section 332 to preserve existing regulation today. See Bell Atlantic Opposition at 18-19.

5. These resellers also defend the DPUC's action on the grounds that it is only seeking to retain rate regulation temporarily. Id. at 7. This is incorrect; the DPUC merely stated that it planned to conduct a new inquiry in 1996 to determine whether to continue rate regulation; if it decided to do so, it would keep regulation in place. Even were the DPUC proposing a specified termination date for rate regulation, that would not justify grant of its Petition, for the Petition still fails to meet the standards set forth by Congress and the Commission. The appropriateness of a specific termination date for regulation is not at issue unless the state shows regulation is necessary at all, and the DPUC has not.

6. The National Cellular Resellers Association supports the DPUC but submits no data as to market conditions in Connecticut. Its comments can thus be ignored. NCRA instead makes blanket assertions about the CMRS industry generally, claiming, for example, that "continued rate regulation is necessary to

restrain the dominating market power of cellular duopolies."[10] Only eight states, however, saw the need to seek authority to retain regulation. In any event, this proceeding is not the forum to raise general issues as to the CMRS market nationwide. NCRA refers to several "reports" which it asserts show that the cellular marketplace does not protect consumers from unjust and unreasonable rates. Id. These documents, however, are misleadingly cited, and supply no evidence as to market conditions in Connecticut, let alone that those conditions merit the DPUC's continued regulatory intervention.[11]

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[10]Comments of the National Cellular Resellers Association at 3.

[11]Two of the reports were in fact briefs filed by the Department of Justice, which are not evidence. None of the reports bear any relationship to whether CMRS rate regulation is necessary to protect consumers in Connecticut. Neither the 1992 GAO or Commission reports made findings of "harm caused consumers," as NCRA asserts. (NCRA Comments at 3.) NCRA even cites the Commission's Second Report and Order in Docket No. 93-252, which made none of the findings NCRA attributes to it. To the contrary, the Commission there found that the cellular industry was sufficiently competitive that tariffing was unnecessary -- precisely the opposite conclusion than what NCRA seeks here.

NCRA's misleading quote from the FTC's comments in the Commission's 1991 rulemaking on bundling of cellular service and CPE is particularly egregious. According to NCRA, the FTC "concludes that 'competition from other services is too insubstantial to constrain facilities-based carriers from exercising market power.'" In fact, the FTC was addressing the degree of substitutability of other communications services for cellular, and noted the lack of empirical data on substitutability. It went on: "Because we find that this issue has not been clearly resolved, we adopt, in this comment, the conservative assumption that competition from other services is too insubstantial to constrain facilities-based carriers from exercising market power." FTC Comments, CC Docket No. 91-34, filed July 31, 1991, at 9-10 (emphasis added). The FTC went on to support the Commission's deregulatory proposals, noting that "the potential for competitive harm, while theoretically possible, does not appear likely." Id. at iv.

7. Another commenter, Nextel, does not specifically support the DPUC's Petition, but argues that the Commission should distinguish between "dominant" and "non-dominant" CMRS providers in determining whether a state has met its burden to escape preemption of CMRS rate regulation. Nextel urges the Commission to use this distinction to create a "relaxed regulatory environment for new entrants."[12] The Commission should see through Nextel's transparent attempt to gain a regulatory advantage at the expense of fair competition. In addition to the fact that neither Congress nor the Commission used the distinction between dominant and non-dominant carriers as the criteria for preemption of rate regulation, Nextel's assertions are plainly self-interested. It is not at all ironic that Nextel argues that California, the only state in which Nextel is currently operating, has satisfied its evidentiary burden to regulate dominant CMRS providers, but not non-dominant providers. Nextel's attempt to create differential regulation is further belied by its assertions in other Commission proceedings that its wide-area SMR service is equivalent or even superior to cellular service.[13] The Commission should not tolerate artificial distinctions between CMRS providers which would grant Nextel a competitive advantage.

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[12]Comments of Nextel at 11-12.

[13]See e.g., Comments of Nextel Communications, Inc., filed in CC Docket No. 94-54, September 12, 1994, at 4-5. (Nextel provides "an advanced mobile communications system capable of providing mobile telephone service comparable to that currently provided by the cellular industry.")

In any event, Nextel does not assert that the DPUC has met its burden of proof under Section 332 and the Commission's Rules. It thus does not provide any support for granting the Petition.

II. CONCLUSION

In sum, the comments supporting the DPUC add nothing to the record. That record shows that the DPUC has not met the legal standard for retaining its wholesale rate regulation of cellular carriers. For the above reasons and those set forth in Bell Atlantic's Opposition, the DPUC's Petition should be denied.

Respectfully submitted,

THE BELL ATLANTIC METRO MOBILE COMPANIES

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Dated: October 19, 1994

CERTIFICATE OF SERVICE

I hereby certify that I have this 19th day of October, 1994, caused copies of the foregoing "Reply of the Bell Atlantic Metro Mobile Companies" to be sent by hand delivery (indicated by an *) or by first class mail to the following:

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